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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC MAIL SECTION

FCC 93-477

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In the Matter of

Review of the Pioneer's
Preference Rules

)
)
) ET Docket No. 93-266
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DISPATCHED BY

Notice of Proposed Rule Making

Adopted: October 21, 1993;

Released: October 21, 1993

Comment Date: November 15, 1993

Reply Comment Date: November 22, 1993

By the Commission: Commissioner Barrett dissenting in part and concurring in part and issuing a statement.

INTRODUCTION

1. By this action, the Commission initiates a review of its pioneer's preference rules to assess the effect of authority to assign licenses by competitive bidding recently enacted by Congress.¹ Now that the Commission's regulatory structure includes authority to select licensees from among mutually exclusive applicants by competitive bidding primarily as a substitute for random selection, this review considers whether the original basis and purpose of the rules continues to support the need for these rules. We consider: whether and how the rules might be amended to take into account competitive bidding and our experience administering the rules, or whether the rules should be repealed.

BACKGROUND

2. The pioneer's preference rules provide a means by which an applicant that demonstrates having developed a new communications service or technology may obtain a license to provide the new service or technology it has developed without

¹ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387, enacted August 10, 1993; Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making (FCC 93-455, released October 12, 1993).

being subject to mutually exclusive applications.² We adopted these rules to promote development of new technologies and services and to improve existing services. Our expressed rationale for these rules was that we would foster development of new technologies and services to the American public by reducing the delays and risks innovators otherwise faced in obtaining a license by either random selection or comparative hearing.

3. Under our pioneer's preference rules, an applicant may be granted a preference for a license if it demonstrates that it has developed a new service or technology; i.e., that it has developed the capabilities or possibilities of the technology or service or has brought the technology or service to a more advanced or effective state. The applicant also must demonstrate that the new service or technology is technically feasible by submitting either a technical showing or results of an experiment.

4. Finally, a preference will be granted only if the final service rules adopted by the Commission are a reasonable outgrowth of the proposal and lend themselves to use of the proposed technology to provide service. An applicant meeting this standard is placed on a pioneer's preference track, is not subject to competing applications, and if otherwise qualified receives a license. Other applicants compete for additional licenses on a separate track.³

DISCUSSION

A. Effect of Competitive Bidding Authority

5. The pioneer's preference rules were established and have been used in the context of the Commission being limited to two procedures for selecting licensees from among mutually exclusive applicants: random selection and comparative hearings. In general, comparative hearings have tended to be time-consuming and costly for both potential licensees and the Commission, and have resulted in delays in providing service to the public.

² The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1992). See Establishment of Procedures to Provide a Preference, Report and Order, 6 FCC Rcd 3488 (1991) (Pioneer's Preference Report and Order); recon. granted in part, Memorandum Opinion and Order, 7 FCC Rcd 1808 (1992); further recon. denied, Memorandum Opinion and Order, 8 FCC Rcd 1659 (1993) (Pioneer's Preference Further Recon. Order).

³ See also Pioneer's Preference Further Recon. Order, 8 FCC Rcd at 1659.

Accordingly, the Commission generally has favored the use of random selection for its licensing selection process. While the random selection method helps expedite licensing, however, it also lessens the chances that an innovator of a service or technology will be successful in obtaining a license due to the large number of speculative applications that often are filed. In 1991, the Commission concluded that absent a pioneer's preference, there was insufficient incentive for an innovative party to propose establishment of a new service or authorization of a new technology.

6. The Commission promulgated the pioneer's preference rules based upon a record indicating that the licensing process discouraged innovators from proposing new services or use of new technologies in existing services. Prosecuting petitions for the necessary rules changes was costly, the technology or concepts had to be disclosed to competitors in the process, and the chance of benefitting by obtaining a license to provide directly the service was small. Accordingly, the pioneer's preference rules were promulgated to create a significant incentive for innovators to submit proposals by providing a license to an otherwise-qualified innovator without subjecting it to mutually exclusive applications.

7. Establishment of competitive bidding authority creates a new dynamic for the assignment of licenses.⁴ Specifically, a bidder, who may also happen to be an innovator, through its bidding efforts would primarily control whether it obtains the desired license. It may obtain the license directly by outbidding other mutually exclusive applicants, whether by using its own financial resources or by soliciting the aid of financial institutions and venture capitalists. One may conclude, therefore, that under this new scheme the value of innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license(s). Thus, we are concerned that competitive bidding authority may have undermined the basis for our pioneer's preference rules.⁵ An applicant that has developed a new service or innovative technology for use in an existing service is now able to obtain directly a license if we authorize the requested service or technology and award licenses through competitive bidding.

⁴ We note that this authority will expire September 30, 1998. See Pub. L. No. 103-66, supra note 1 at Section 6002(a), to be codified at 47 U.S.C. § 309(j)(11).

⁵ We are required to reexamine the public interest basis of rules when the basis asserted by the Commission no longer exists. See Bechtel v. F.C.C., 957 F.2d 873, 881 (D.C. Cir. 1992) (subsequent history omitted); Geller v. F.C.C., 610 F.2d 973 (D.C. Cir. 1979) (per curiam).

8. However, when we promulgated the pioneer's preference rules, we recognized that innovators may be small entrepreneurs who find it difficult to obtain financial support for their proposals, even if innovative and beneficial. In this regard, we recognize that in authorizing competitive bidding Congress also required us to ensure that licenses are assigned among a wide variety of applicants, including small businesses.⁶

9. We note also that the statute explicitly provides that nothing in the competitive bidding provisions of the Act shall be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology.⁷ That this statutory language refers to our pioneer's preference rules is confirmed in the Conference Report on the legislation.⁸ We also note that the House Report on the bill expressed neutrality toward our pioneer's preference policy. The Report states:

This [pioneer's preference] policy specifically has never been encouraged, nor discouraged, by an action taken by this Committee. To the extent that this policy is consistent with the provisions of this section; other provisions of the Communications Act, and other applicable law, the Commission is free to continue to implement such a policy. The Commission should not, however, view the Committee's neutrality as any type of blessing or approval of its policies. The provisions of section 309(j) are, again, expressly neutral with respect to these policies.⁹

⁶ Pub. L. No. 103-66, supra note 1 at Section 6002(a), to be codified at 47 U.S.C. § 309(j)(3)(B).

⁷ Id., to be codified at 47 U.S.C. § 309(j)(6)(G).

⁸ H.R. Rep. No. 103-213, 103d Cong., 1st Sess. at 485 (1993) (Conference Report). At House hearings on competitive bidding authority witnesses addressing pioneer's preferences expressed approval of their purpose and belief that their continuance would be consistent in a regulatory scheme that included competitive bidding. For example, Jack Pellici of Oracle Corp. strongly endorsed pioneer's preferences and stated that pioneers should not be required to pay for the spectrum. See Emerging Telecommunications Technologies, Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, U.S. House of Representatives, 103d Cong., 1st Sess. at 98 et seq. (1993).

⁹ H.R. Rep. No. 103-111 at 257.

10. Finally, we note that Congress authorized use of competitive bidding methods only when multiple applications are filed that are mutually exclusive.¹⁰ Inasmuch as we have determined that a pioneer's preference application will be the sole application acceptable for filing for the specific license at issue,¹¹ we believe that the statutory language, combined with our pioneer's preference regulatory scheme as it currently exists, exempts pioneer's preference licensees from payment for a license so issued. Nevertheless, Southwestern Bell Corporation recently filed a letter in the 2 GHz broadband Personal Communications Services (PCS) proceeding in which it argues that the statute and rules do not necessarily result in a license being free for pioneer's preference grantees. In addition, other parties have filed petitions for reconsideration in the 900 MHz narrowband PCS proceeding arguing that the grantee therein should pay a fee equivalent to the auction value of the spectrum to prevent, inter alia, anti-competitive results.¹² If the rules are retained, we request parties to address whether we are legally permitted to charge for a license obtained through the

¹⁰ Pub. L. No. 103-66, supra note 1 at Section 6002(a), to be codified at 47 U.S.C. § 309(j)(1).

¹¹ See Pioneer's Preference Further Recon. Order, supra note 2 at 1659.

¹² In petitions for reconsideration or clarification of the First Report and Order in GEN Docket No. 90-314 and ET Docket No. 92-100, PageMart, Inc. states that Mtel should be required "to pay a minimum successful bid price for the license it will acquire by virtue of its pioneer's preference," Petition for Reconsideration at 14 (September 10, 1993); Paging Network, Inc. states that "it would be appropriate for the Commission to seek comment on the mechanism for determining the price which Mtel should pay in its upcoming auction rulemaking, notwithstanding the fact that the Commission has apparently concluded that Mtel will not be subject to competing applications," Petition for Reconsideration and Clarification at 20 (September 10, 1993); and Pacific Bell states that "the pioneer's preference licensee should be required to pay a fee equal to the lowest winning bid for the appropriate licensing area," Petition for Clarification at 2 (September 10, 1993). Southwestern Bell Corporation, in a letter filed in GEN Docket No. 90-314, states that "Requiring pioneers to be subject to auction pricing neither disadvantages them as compared to other licensees nor denies them the benefit of their preference," Letter re: Personal Communications Services and Pioneer Preference Issues at 3 (October 14, 1993). These submissions have been included in the file of this docket, and to the extent they address our pioneer's preference rules generically, will be considered in this proceeding in addition to the proceeding in which they were filed originally.

pioneer's preference process, and if so, how that charge should be established.

11. Accordingly, based upon the discussion above, we solicit comment on whether our pioneer's preference rules continue to be appropriate in an environment of competitive bidding. We solicit comment on whether competitive bidding permits innovative parties to have a reasonable expectation of obtaining licenses. We also request comment on whether small businesses would be affected differently from other concerns by retention or repeal of the rules.¹³

12. Alternatively, we request comment on whether if we retain the preference rules, we should amend them to better work with our competitive bidding authority. Specifically, we solicit comment on alternatives to awarding licenses outright, such as simply designating pioneering parties in a report and order (R&O) establishing a new service or technology, but not guaranteeing these parties licenses. Under this approach, such parties would likely have increased opportunities with financial institutions and venture capitalists. As an added incentive, we could discount bids by designated pioneers by some specific amount or percentage. For example, if a pioneer submitted a winning bid, it might be required to pay only 75 percent of the bid.

B. Administrative Amendments to the Pioneer's Preference Rules

13. If we retain the pioneer's preference rules, we believe we should consider a number of administrative changes that may relieve both our staff and the public of unnecessary burdens. We believe that our current policy of issuing public notices specifying filing deadlines, considering raw experimental license material that relates to preference requests, and making initial determinations on pioneer's preference requests may burden unnecessarily both the Commission's staff and the public with no offsetting public benefit.

14. Currently, the deadline for filing pioneer's preference requests is established by a public notice issued at least 30 days in advance of the deadline date, and prior to the notice of proposed rule making (NPRM) regarding the subject service or technology.¹⁴ We believe that issuance of this public notice in some instances has appeared to attract speculative requests. By definition, a telecommunications pioneer should be an entity that at an early stage of a technology's or service's development

¹³ Comments on this issue should take into account our proposals relating to small businesses in our proceeding to adopt competitive bidding rules, supra note 1.

¹⁴ 47 C.F.R. § 1.402(c) (1992).

has been instrumental in influencing that development. Our experience with the pioneer's preference process convinces us that applicants should be required to file their request demonstrating an innovative contribution prior to Commission initiation of an inquiry or rulemaking proceeding.¹⁵

15. Our experience also convinces us that a pioneer's preference applicant should be required to incorporate only relevant experimental material into its preference request, rather than submitting its entire experimental file as part of the request. Since only a portion of the experimental file is relevant to the request, we believe that the applicants should select and explain the material that they submit. This change will better focus the preference requests and facilitate more meaningful comments by other parties.

16. Under the current scheme we make an initial determination on a request for pioneer's preference at the NPRM stage of a proceeding that addresses a new service or technology, and a final decision at the R&O stage.¹⁶ We now propose a change in this procedure. Instead of making a tentative decision at the NPRM stage, comments could be filed on the pioneer's preference requests at the same time as the NPRM. As under our current rules, because pioneer's preferences involved adjudicatory matters that will implicate restricted ex parte rules if any requests are formally opposed, comments on the preferences would continue to be filed in separate pleadings. A decision on the preference requests would be made at the R&O stage. Eliminating the tentative decision stage would permit the Commission and the public to consider fully the pioneering efforts and technologies in conjunction with the proposed service, rather than making a tentative decision before determining the specifics of whether a service should be established or rules amended governing an existing service.

17. Finally, we propose to limit acceptance of pioneer's preference requests to services that use new technologies, and to clarify that innovative technology is a necessary basis for award.¹⁷ We believe that merely using existing technologies to provide a new service is not innovative in the sense intended by

¹⁵ For purposes of our proposal, Commission adoption of either a Notice of Inquiry or an NPRM would constitute initiation of the proceeding.

¹⁶ 47 C.F.R. § 1.402(d) (1992).

¹⁷ As discussed at para. 37 of the Pioneer's Preference Report and Order, note 2 supra, we will not award a preference for a new technology unless that technology is associated with a licensable service.

pioneer's preferences. Our experience with pioneer's preferences convinces us that preferences should not be awarded for new services per se, but only for new technologies used to provide new services or that significantly improve existing services. As technology progresses, higher frequency bands consistently become economically viable for new services. Transferring a technology from an existing service in a lower band to a "new" service in a higher band should not be recognized by award of a pioneer's preference.

C. Existing Pioneer's Preference Requests

18. From the time the rules were adopted in 1991, the Commission has awarded two pioneer's preferences in two different services. The first pioneer's preference was granted to Volunteers in Technical Assistance (VITA) in the non-voice, non-geostationary (NVNG) mobile satellite service below 1 GHz. VITA established that it was the first to develop and demonstrate the feasibility of using a low-Earth orbit (LEO) satellite system on VHF/UHF frequencies for civilian digital message communications purposes. The second grant was made to Mobile Telecommunication Technologies Corporation (Mtel) in the 900 MHz narrowband PCS proceeding for having demonstrated its development of an innovative technology that will result in new service to the public and increase spectrum efficiency.¹⁸ Disposition of pioneer's preference requests in these two proceedings already were made before Congressional enactment of competitive bidding authority, and as a matter of equity, nothing in this review will affect these proceedings.¹⁹

19. We also have pending four pioneer's preference tentative grants in two services. In the 2 GHz broadband PCS proceeding, we tentatively concluded that pioneer's preferences

¹⁸ See Report and Order, ET Docket No. 91-280, 8 FCC Rcd 1812 (award to VITA); and First Report and Order, GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993), (award to Mtel), petitions for reconsideration and clarification pending, appeals pending sub nom. BellSouth Corp. v. FCC, No. 93-1518 (D.C. Cir. filed August 20, 1993) and Freeman Engineering Associates, Inc. v. FCC, No. 93-1519 (D.C. Cir. filed August 23, 1993).

¹⁹ Applications currently pending in the NVNG service are not mutually exclusive and therefore cannot be subject to assignment using the competitive bidding process, see Competitive Bidding Notice, supra note 1. Although we have proposed that mutually exclusive applications in the 900 MHz narrowband PCS service be assigned using the competitive bidding process, id., we conclude that it would be inequitable to apply any change in our rules in that pioneer's preference proceeding.

should be awarded to three applicants; and in the 28 GHz local multipoint distribution service (LMDS) proceeding we tentatively concluded that one applicant should be awarded a preference.²⁰ We ask for comment on whether any repeal or amendment of our rules should apply to these proceedings.

20. Finally, approximately twelve requests remain before us for which tentative decisions have not been issued. We propose that any repeal or amendment of our rules apply to these proceedings and request comment on this conclusion.

CONCLUSION

21. In view of our new authority to use competitive bidding to assign licenses and our experience administering the pioneer's preference rules, we initiate this review of the purpose and basis for the pioneer's preference rules and their operation. We believe that these rules must be re-examined with respect to competitive bidding authority, but express no conclusion as to whether they should be repealed or modified. We seek comment on all aspects of these rules. With respect to our experience administering the rules, if the rules are continued, we propose changes to improve their administration. During the pendency of this proceeding, we will not rule on any pioneer's preference requests now before us in proceedings in which a pioneer's preference request has not already been granted. In order not to delay the licensing of 2 GHz PCS, we intend to adopt a Report and Order in the instant proceeding expeditiously, and any necessary Order regarding 2 GHz PCS pioneer's preferences in advance of or at the same time that we adopt a Report and Order in our competitive bidding proceeding, which by statute must be no later than March 8, 1994.

²⁰ See Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd 7794 (1992) (pioneer's preferences tentatively awarded to American Personal Communications, Cox Enterprises, Inc., and Omnipoint Communications, Inc. in the 2 GHz PCS proceeding); and Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration, CC Docket No. 92-297, 8 FCC Rcd 557 (1993) (pioneer's preference tentatively awarded to Suite 12 Group in the 28 GHz LMDS proceeding). In the Notice of Proposed Rule Making and Tentative Decision in the above 1 GHz LEO satellite proceeding, ET Docket No. 92-28, 7 FCC Rcd 6414 (1992), we tentatively proposed to award no pioneer's preferences.

PROCEDURAL INFORMATION

Regulatory Flexibility Act

22. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1988).

Ex Parte Rules

23. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a) (1992). We note, however, that many pioneer's preference requests have been formally opposed, and in these proceedings, no ex parte presentations are permitted until final Commission decisions regarding the preference requests are made and are no longer subject to reconsideration by the Commission or review by any court.

Comment Dates

24. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419 (1992), interested parties may file comments on or before November 15, 1993, and reply comments on or before November 22, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of comments, you must file an original and nine copies. Comments and reply comments must be sent to the Office of Secretary, Federal Communications Commission, Washington, DC 20554. These comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington DC 20554. The complete text of this Notice of Proposed Rule Making also may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, N.W., Room 236, Washington DC 20554; telephone (202) 857-3800.

Authority

25. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), and 309(j).

Contact Person

26. For further information concerning this proceeding, contact Rodney Small, (202) 653-8116, Office of Engineering and Technology.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
William F. Caton
Acting Secretary

Appendix

Initial Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals contained in this NPRM. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above.

A. Reason for Action.

This rule making proceeding is initiated to obtain comment regarding possible modifications to, or repeal of, the pioneer's preference rules.

B. Objectives.

The Commission seeks to review the public interest basis for its pioneer's preference rules in light of recently enacted statutory authority to assign licenses by competitive bidding and its experience administering the rules since 1991.

C. Legal Basis.

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r), and 303(j), and Section 6002 of the Omnibus Budget Reconciliation Act of 1993, to be codified at 47 U.S.C. § 309(j).

D. Reporting, Recordkeeping and Other Compliance Requirements.

None.

E. Federal Rules That Overlap, Duplicate, or Conflict With These Rules.

None.

F. Description, Potential Impact, and Number of Small Entities Involved.

The rule changes proposed could affect small businesses if they have pioneer's preference requests pending, if they contemplate filing pioneer's preference requests, or if they intend to file applications for services in which others might

receive a pioneer's preference. We do not intend to take any action that would unnecessarily lessen the ability of small businesses to participate in services that use new technologies. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives.

The NPRM discusses a range of options for repeal or amendment of the pioneer's preference rules. We solicit comment on the options that would be preferable for small entities.

**STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT
DISSENTING IN PART/CONCURRING IN PART**

In Re: Review of the Pioneer's Preference Rules

This Notice of Proposed Rulemaking [Notice] undertakes a complete review of the merits of pioneer preference rules under our new authority to issue licenses through competitive bidding. This item also confirms the grant of pioneer preferences to VITA and Mtel in prior proceedings concerning Low-Earth Orbit mobile satellite services below 1 GHz and narrowband Personal Communications Services[PCS], respectively. The Notice puts all remaining pioneer preferences in a "limbo status" pending a decision to totally repeal all pioneer preference rules, or amend the rules in the context of competitive bidding. Due to the analytical inconsistencies apparent in this item, and the extreme inequity of refusing to decide the pioneer preference issues in the 2 GHz PCS docket [90-314], I dissent to portions of this Notice that propose to repeal the pioneer preference rules, and delay or possibly repeal the grant of pioneer preferences in the 2 GHz PCS docket.¹ To subject pioneer preference applicants in the 2 GHz PCS docket to possible repeal of these rules at this late date, is neither reasonable or necessary. In the face of what I predicted would be a difficult decision due to the serious flaws of the PCS Order, the majority has retreated from making tough decisions on which license to grant a broadband PCS pioneer. At least in the PCS Order, some decision was made. This action is an apparent retreat from any decision in the 2 GHz PCS pioneer preference item. Given the millions of dollars spent by numerous large and small entities to provide experimental PCS information and innovative service concepts, I believe this action constitutes the ultimate public policy "bait and switch".²

¹ I also dissent to this item because it delays the future grant of a pioneer preference in the Local Multipoint Distribution Service [LMDS] at 28 GHz, subject to possible repeal of the rules. See Notice at 9, n 20.

² The Commission received 96 pioneer preference requests in the 2 GHz PCS docket. OET accepted 57 of these applications. The Commission tentatively selected 3 of these applications. As of July 1993, the FCC had granted 188 experimental PCS licenses in markets throughout the country.

I dissent to this action as a matter of public policy and as a matter of equity for four reasons:

1. The 1993 Omnibus Budget Reconciliation Act [Act], portions of which granted the Commission competitive bidding license authority, does not prevent the Commission from awarding licenses to "those persons who make significant contributions to the development of a new telecommunications service or technology."³ The Act also provides the Commission with discretion to pursue competitive bidding licensing schemes without basing a public interest finding on the expectation of Federal revenues.⁴ Based on this language, it is not clear that competitive bidding either alters the Commission's ability to grant pioneer preferences, or requires us to account for competitive bidding revenues if the pioneer is not required to pay for the license. Thus, as a matter of public policy, the Commission currently has the discretion to go forward with its pioneer preference rules and grant pioneer preferences to applicants in the 2 GHz PCS docket [90-314] or in any other future dockets. I dissent to the extent that we utilize this policy discretion to propose the possible repeal of these rules due to the competitive bidding process.

2. The pioneer preference rules give small businesses and rural companies an incentive to engage in research and development process for new services or technologies, particularly in the context of competitive bidding. I do not believe there is a sound public policy rationale for hindering potential avenues for small business participation through the pioneer preference process. The Omnibus Act requires that the Commission provide economic opportunities for small businesses and rural telephone companies to participate in spectrum-based services.⁵ Since these statutory provisions are included in the Act's competitive bidding language, I believe we should continue to grant pioneer preferences, particularly where small businesses and rural companies have additional incentives to participate. Further, I believe that granting a pioneer preference, without requiring payment for the license, is consistent with this goal. The capital costs projected for PCS could be prohibitive to small businesses in the competitive

³ This provision was added in Conference from a Senate amendment which included provisions concerning our Pioneer Preference rules. For statutory basis, see generally Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002, 107 Stat. 387, enacted August 10, 1993 and H.R. Report No. 103-111, 103d Cong. 1st Sess. at 11 (1993) (hereafter Omnibus Budget and Conference Report).

⁴ Omnibus Budget and Conference Report, §§ 309(j)6, 309(j)7.

⁵ Id. at §§ 309(j)3, 309(j)4.

bidding context, particularly where they also seek to provide the Commission with innovative service or technology applications.⁶ Thus, I believe that the grant of a pioneer preference further enables small businesses to participate in all aspects of our dockets for new and emerging services.

3. I believe the Commission was aware of the potential for competitive bidding authority at the time it made a final selection of Mtel in the narrowband PCS docket; and at the time it tentatively designated APC, Cox and Omnipoint as pioneer selectees in the 2 GHz PCS docket [90-314].⁷ In July 1992, the Commission issued a Notice of Proposed Rulemaking that acknowledged the

⁶ The effects of sudden changes on the regulatory structure for emerging technologies can be unsettling; particularly in areas that effect capital formation. During our earlier debates on the number of licenses to be issued in the spectrum allocation, one ex parte contact argued, "[w]ith the introduction of [multiple licenses], assuming equal market shares, the capital investment per subscriber for Cablevision's alternative architecture climbs to \$1,360 for partial residential/street coverage and \$2,422 for ubiquitous residential/street coverage. Remembering that this comparison only includes the incremental radio delivery and support electronics of an otherwise PCS ready cable plant, and does not include capital costs for switching, billing, plant make ready, additional primary and standby power supplies, auction license acquisition investments, or capital outlay to relocate OFS users, the economic viability of [multiple] licensees is highly doubtful." See In re Cablevision Systems Corporation Analysis of Capital Costs of PCS Networks, Notice of Ex Parte Presentation, Gen. Dkt. No. 90-314 (September 15, 1993).

⁷ Our June 24, 1993 decision to authorize narrowband PCS services, included a nationwide license pioneer preference award to Mtel for its pioneering efforts. This item denied pioneer preference requests for 18 other entities. The Order granted this pioneer preference while acknowledging that the House and Senate had passed legislation authorizing competitive bidding for licenses, such as narrowband PCS. In the Matter of Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, Gen. Dkt. No. 90-314 (June 24, 1993) paragraphs 62 to 72 and same, Andrew C. Barrett issuing separate statement. (June 24, 1993) (discussing the need to address impact of auctions on small business entities who seek PCS licenses.) See also, Separate Statement of Commissioner Andrew C. Barrett, June 24, 1993, in docket ET 92-100 and Gen Docket 90-314.

potential for competitive bidding as a licensing scheme for PCS.⁸

In October 1992, the Commission issued a Tentative Decision and Memorandum Opinion and Order in the PCS docket which selected APC, Cox and Omnipoint as tentative pioneer preference selectees from among 57 evaluated applicants. This decision was made subsequent to the July 1992 PCS Notice, and continued to contemplate the potential for competitive bidding of PCS licenses.⁹ I believe it is both inconsistent and contradictory to suggest, at this late date, that the Commission is suddenly confused about pioneer preferences in the competitive bidding context. The June 1993 decision to grant Mtel a pioneer preference was clearly made while acknowledging the need to develop competitive bidding rules for narrowband PCS. Our September 1993 Notice of Proposed Rulemaking to implement competitive bidding clearly delineates narrowband PCS for this licensing scheme.¹⁰ Thus, a proposal to repeal the rules at this late date, and possibly grant no further preferences, is inconsistent with our past recognition of the prospects for competitive bidding. Further, with respect to the broadband PCS docket, the Commission now must ignore its past recognition of the possibilities for competitive bidding at the time it tentatively selected APC, Cox and Omnipoint. Thus, I am absolutely confused by the decision to avoid a pioneer preference decision in the broadband PCS docket. I dissent to this aspect of the Notice, given the clear inconsistencies involved in a "no vote" decision.

4. If the PCS Order had granted more rational, consistent allocations of PCS licenses in each market, instead of the unfocused variety of licenses presently available, I believe a pioneer preference decision in the 2 GHz docket would have been easier. Instead, the majority is now stuck with a labyrinth of wider areas licenses and miniscule licenses with uneconomic spectrum sizes. As a result, the consternation over which licenses to grant broadband PCS pioneers will apparently continue to be a problem. As I indicated in my dissent to the PCS Order, I believe pioneer preference selectees should receive significant allocations in terms of market size and spectrum. Since we already have granted Mtel a nationwide PCS license for narrowband service,

⁸ In re Personal Communications System, Notice of Proposed Rulemaking, Gen. Dkt. No 90-314, Et Dkt. 92-100. (Andrew C. Barrett issuing separate statement) (July 16, 1993) (discussing the need to address impact of auctions on small business entities who seek PCS licenses.)

⁹ In re Implementation of Section 309(j) of the Communications Act of 1992: Competitive Bidding, Notice of Proposed Rulemaking, (October 12, 1993) FCC 93-455.

¹⁰ Id. (Andrew C. Barrett issuing separate statement.)

apparently without requiring any payment, I do not understand the majority's dilemma in granting a regional license block to any pioneer preference selectees in the broadband PCS service. Perhaps if we can arrive at a better allocation scheme for broadband PCS services upon reconsideration, the Commission will find itself able to make an affirmative decision in this regard.

To the extent this item seeks to refine the current pioneer preference rules, and considers flexibility to grant additional pioneering designations, I concur. However, I do not believe these proposals should have been the basis for avoiding a pioneer preference decision in the 2 GHz PCS docket. As with our decision regarding Mtel, I believe the Commission is presently in a position to proceed with a pioneer preference order in the broadband PCS docket.¹¹

¹¹ For prevailing arguments in favor of our ability to render a decision in this docket, see *In Re Personal Communication Service/Pioneer Preference Issues, Notification of Ex Parte Presentation, Omnipoint Corporation*, Gen. Dkt. 90-314 (September 29, 1993) at 7,8; *In Re Personal Communication Service/Pioneer Preference Issues, Notification of Ex Parte Presentation, Cox Enterprises, Inc.*, Gen. Dkt. 90-314 (September 28, 1993) at 2; *In Re Personal Communication Service/Pioneer Preference Issues, Notification of Ex Parte Presentation, Cox Enterprises, Inc.*, Gen. Dkt. 90-314 (September 28, 1993) at 2.